HOH CHEE KHIM & ORS.
v. PUBLIC PROSECUTOR

[A.Cr.J. (Abdul Aziz J.) October 22, 1969]

[Kuala Lumpur — Criminal Appeal No. 22 of 1969]

Pawnbrokers — Pawned articles — Items of jewelleries in cheating case — Enquiry — Return of articles to complainant — Pawnbrokers Enactment (Cap. 85), s. 20 — Criminal Procedure Code (Cap. 6), s. 407.

This was an appeal against the decision of the sessions court in an enquiry under section 20 of the Pawnbrokers Enactment wherein it was ordered that all the exhibits comprising the various items of jewelleries in a cheating case be returned to the complainant unconditionally and without payment.

Held: section 20 of the Pawnbrokers Enactment is complementary to section 407 of the Criminal Procedure Code. Although section 407 gives power to the court to make an order as it thinks fit for the disposal of the property produced before it in respect of pawned articles, the disposal must be subject to section 20 of the Enactment. It can only be delivered to the owner, but whatever order the court makes, the owner can assert his legal right and there are civil remedies available to the complainant which he could use to assert his right of recovery. It is not within the power of the court acting under section 20 to decide summarily involved questions of ownership of the jewelleries bought by the accused with money which was obtained dishonestly from the complainant.

Cases referred to:-

(1) *Sem Hin Pawnshop* v. *R.* [1952] M.L.J. 164.

(2) *Ho York Quin of Chop Teck Chong Pawnshop* v. *R.* [1953] M.L.J. 1.

(3) *R.* v. *Nadaison* [1935] M.L.J. 148.

(4) *Leicester* v. *Cherryman* [1907] 2 K.B. 101.

MAGISTRATE'S CRIMINAL APPEAL.

M. Shankar for the appellants.

Ahmad bin Abdul (Deputy Public Prosecutor) for the respondent.

Abdul Aziz J.: This is an appeal against the decision of the learned president of the sessions court Kuala Lumpur in an enquiry under section 20 of the Pawnbrokers Enactment (Chapter 85) wherein he ordered that all the exhibits comprising the various items of jewelleries in a cheating case be returned to the complainant unconditionally and without payment. The total pawned value of the jewelleries, the subject matter of the inquiry, is $6,400.

The accused in this case, one Maria @ Zainon binte A. Manaf, pleaded guilty to the three charges of cheating and was convicted and sentenced to six years' imprisonment plus police supervision. She was a confidence trickster of the highest order who thrived on superstition and human weaknesses. She admitted that by preying on the complainant's weakness she was able to induce him to part with money and jewelleries which, according to the complainant, amounted to $161,000. The *modus operandi* was a promise that by the use of supernatural powers which she possessed, supernatural beings could multiply the money and valuables handed to her. Thereby, she managed to induce the complainant to part with a considerable cash and jewelleries. Her ingenuity did not stop there. Some of the jewelleries were pawned to various pawnbrokers by inducing innocent third parties to act as pawners under dubious pretexts which she concocted in order that she would not be directly implicated. With the cash, she bought jewelleries which she again later pawned either personally or again through her friends. In one case, she induced the complainant himself to pawn the jewelleries and to hand her the cash.

The evidence shows that exhibit 2 and exhibit 6, comprising one pair of gold diamond ear studs and brooches, the property of the complainant, were pawned for $8,000 and $1,000 at Fook Shing and Nam Lee pawnshops respectively; that exhibits 3, 4, 5 and 7 were purchased by her using money dishonestly obtained from the complainant and later pawned to various pawnshops; and that exhibit 8, the property of the complainant, was pawned by the complainant who handed the money over to the accused. These are the circumstances of pawning which the learned president must take into account when making an order under section 20 of the Pawnbrokers Enactment which reads: —

"If in any proceedings before any court or magistrate it shall appear that any article which has been lost or dishonestly or fraudulently obtained or acquired is held in pawn by any pawnbroker, such court or magistrate may take evidence as to the circumstances of such pawning, and if such court or magistrate so think fit may order the delivery of such article to the owner either on payment to the pawnbroker of the amount lent thereon and of the profit due, or on payment of any part of such loan or profit, or without payment, as to such court or magistrate may seem just and fitting according to the conduct of the owner and the circumstances of the case."

It will be noted here that the section only enables the court to make an order for the delivery of the articles pawned to the owner and not to anybody else. And in making such an order, the court may in its discretion mitigate the harshness of the rule by imposing such conditions as may seem just and fitting according to the circumstances of each case.

In *Sem Hin Pawnshop* v. *Regina*[1] Brown J. in construing the provision of section 27(1) of the Singapore Pawnbrokers Ordinance, which is somewhat similar to our provision, states: —

"Having established the ownership, the magistrate must then consider the evidence of the circumstances in which the article came to be lost and the circumstances in which it came to be pawned. It is at this point that the magistrate's discretion has to be exercised. Ownership having now been proved, by common law the owner would be entitled to the article unconditionally, however careless he had been; and the innocent pawnbroker — if he is innocent — would have to suffer without receiving any compensation for the amount of the loan which he has lost. But the section gives the magistrate a discretion to mitigate this hardship, if he thinks fit, after taking into account "the conduct of the owner and the other circumstances of the case". In a case where the conduct of both parties is free from criticism I cannot think of any circumstances which would cause the court to order the owner to pay a part of the loan; and the innocent pawnbroker must suffer for having taken a risk which is inseparable from his trade."

In *Ho York Quin of Chop Teck Chong Pawnshop* v. *R.*,[2] Sir Charles Murray-Aynsley C.J. stated: —

"This section [27(1) of the Singapore Pawnbrokers Ordinance] follows the English Pawnbrokers Act of 1862. All that need be said is that the court has the fullest discretion as to whether to make an order or not and in the order it makes if it should decide to make one. The matter was reviewed by Huggard C.J. in the local case of *Nadaison*.[3] I only mention the matter because I think that case might prove misleading.

In the first place it should be noted that an order made under the Ordinance does not affect rights of property. It merely gives power to give possession. Whatever the order the court makes, the owner can assert his legal rights [see *Leicester* v. *Cherryman*.(4)]

The court may make its order as 'according to the conduct of the owner and the other circumstances of the case, seems just and fitting'. The 'other circumstances of the case' means in most cases the conduct of persons other than the owner.

As regards conduct, I think it can be said definitely that if the person seeking the order has been guilty of dishonesty, an order should not be made. In this respect I think the order made in the case reported, so far as it related to the property of Nadaison, is wrong. If in that case the defrauded pawnbroker had kept the goods, he could have counterclaimed with success if the thief had taken proceedings to recover them. In the cases where orders are made the conduct of the parties means therefore, in practice, negligence.

The common law is very tender to true owners whether negligent or not. Courts should not, in my opinion, make orders under this section except on terms where the true owner has failed to take reasonable care of his property.

It should be noted that the section merely gives power to order delivery. It does not confer power to give a judgment for a sum of money when the pawnbroker no longer has the property, as was done by Huggard C.J. in the case referred to.

It is a safe rule that in cases of doubt or difficulty an order should not be made."

Section 20 of the Pawnbrokers Enactment is complementary to section 407 of the Criminal Procedure Code (relating to disposal of property the subject of offences). Although section 407 gives the power to the court to make such an order as it thinks fit for the disposal of the property produced before it, in respect of pawned articles, the disposal must be subject to section 20 of the Pawnbrokers Enactment. It can only be delivered to the owner, but as Sir Charles Murray-Aynsley C.J. said in *Ho York Quin's* case (above), whatever order the court makes, the owner can exert his legal right and there are civil remedies available to the complainant which he could use to assert his right of recovery. It is not within the power of the court acting under section 20 to decide summarily involved questions of ownership of the jewelleries bought by the accused with money which she obtained dishonestly from the complainant.

In respect of exhibits 2 and 6, the ownership of the jewelleries having been fully established and having regard to the circumstances of the case, the order for the unconditional return of the pawned articles is proper and should, therefore, stand.

As regards exhibit 8A-B also and since the ownership of the articles has been established, but having regard to the circumstances of the pawning, there will be an order that these articles be returned to the complainant subject to payment of the amount lent but without profit.

In regard to the other exhibits, *i.e.* exhibits 3, 4, 5 and 7, since the complainant's ownership of the articles has not been established, the order of the learned president will be quashed and the exhibits will be delivered to the pawnbrokers after expiry of the period of one month from the date of this order.

Order accordingly.

Solicitors: *Shearn, Delamore & Co.*

PARAMASIVAM v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) January 16, 1970]

[Ipoh — Criminal Appeal No. 40 of 1969]

Bribery and Corruption — Evidence — Prosecution witness — Explanation not acceptable to court — Defence asking to be allowed to cross-examine before impeachment — Court's refusal — Prevention of Corruption Act, 1961, s. 4(a).

Criminal Law and Procedure — Prosecution witness — Impeachment before defence being allowed to cross-examine.

The appellant was convicted of an offence punishable under section 4(a) of the Prevention of Corruption Act, 1961 and sentenced to six months imprisonment. Against that conviction and sentence he appealed. The main ground of appeal was that in refusing to allow a prosecution witness, to be cross-examined, or to complete her evidence and in holding her completely discredited the learned president of the sessions court had erred.

Held, quashing the conviction and ordering a retrial: the defence should at all times be allowed the opportunity of defending within the well-established principles of adversary trial as against the inquisitorial system, and where there is *prima facie* a valid complaint, however thin it might be, it must be entertained.

MAGISTRATE'S CRIMINAL APPEAL.

Dato' S. P. Seenivasagam for the appellant.

M. Mahalingam (Deputy Public Prosecutor) for the respondent.

Chang Min Tat J.: The appellant was convicted of an offence punishable under section 4(a) of the Prevention of Corruption Act No. 42 of 1961 and sentenced to six months' imprisonment. Against that conviction and sentence he now appeals.

The main ground of appeal was that in refusing to allow a prosecution witness, a Raja Nurulaini, to be cross-examined, or to complete her evidence and in holding her completely discredited, the learned president had erred. Now what this particular witness said in evidence was to the effect that the accused was seated at his desk when 2 officers from the anti-corruption agency walked in and that one of the 2 officers suddenly stooped down and picked up something from the floor. At this stage in her evidence, the prosecuting officer applied to have her impeached on the strength of what were alleged to be material and relevant contradictions contained in her previous statement to the police. The application was allowed. The witness in answer to questions put to her by the learned president himself admitted that she made the statement concerned, but explained that the differences in that statement were occasioned by nervousness. Her explanation was not acceptable to the court. Thereupon, counsel for the accused asked that he be allowed to cross-examine the witness before the ruling was made and that in the interest of justice she should be allowed to complete her evidence. He was denied the opportunity asked for. The court then ruled that the witness was successfully impeached by the prosecution and that her evidence would not be considered.

Having read the statement made by the witness to the police, I am at a loss to understand why she was called in the first place. Her evidence did not appear to have any bearing at all. On the question of whether the accused was standing or seated when the anti-